Filed 7/18/19 Sarno v. Fite CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JOHN SARNO et al.,	
Plaintiffs and Respondents,	G056456
v.	(Super. Ct. No. 30-2017-00942737)
JAKOB FITE et al.,	O P I N I O N
Defendants and Appellants.	

Appeal from an order of the Superior Court of Orange County, Ronald L. Bauer, Judge. Affirmed.

Morris & Stone and Aaron P. Morris for Defendants and Appellants.

Neasham & Kramer, Patricia Kramer and Chad A. Vierra for Plaintiffs and Respondents.

Jakob Fite, Melissa Fite, and White Rabbits Social Club (WR)[1] appeal from the trial court's order denying their special motion to strike[2] John Sarno and Leslee Sarno's[3] complaint for defamation, invasion of privacy, intentional infliction of emotional distress, negligent infliction of emotional distress, and civil conspiracy. The Fites and WR argue the court erred because the Sarnos' claims arose from protected activity. We disagree and affirm the order.

FACTS

I. Substantive Facts

The facts are derived from the complaint and the evidence submitted in connection with the special motion to strike. (§ 425.16, subd. (b)(2).)

A. Disneyland Social Clubs

Disneyland enthusiasts created unincorporated associations to socialize with each other in the park. The social clubs were named for a Disney character or theme, and in the park, members wear clothing, etc., identifying their club. The social clubs maintain Web pages on social media platforms. Two of the social clubs are "The Main St. Fire 55 Social Club" (MSF) and WR.

---

[1] For sake of clarity we refer to Jakob and Melissa individually by their first names and Jakob, Melissa, and WR collectively as the Fites, unless the context requires otherwise.

[2] A special motion to strike is also known as an anti-SLAPP (Strategic Lawsuit Against Public Participation) motion. (Code Civ. Proc., § 425.16, all further statutory references are to the Code of Civil Procedure; *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055.)

[3] For sake of clarity we refer to John and Leslee individually by their first names and collectively as the Sarnos.

B. John & MSF

John was previously a licensed emergency medical technician (EMT) in Sacramento. John visited Disneyland for decades and was an annual pass holder. After John and Leslee were married, they visited the park together; John never visited the park without her.

In 2015, John formed MSF, which he named for the park's fire station on Main Street, and it had about 10 members. Each member adopted a fictional firefighter rank that he/she wore on a name tag on his/her club jacket; John's was "Battalion Chief." MSF had an Instagram account and two Facebook pages, one for its Southern California members and one for its Northern California members.

In September 2015, the Sarnos decided to have MSF sponsor a fundraising walk at Disneyland on September 11, 2016, and donate the money to a scholarship fund for children of 9/11 firefighters who died. The Sarnos decided to limit the number of participants in the walk to 343, the number of firefighters who died on 9/11. John contacted WR and other social clubs to see if any of their members wanted to participate.

C. Jakob Fite[4] *& WR*

Jakob formed WR in April 2014, and by 2016, it had 200-300 members. WR had a Facebook page. Fite created "Club Hub," which was a private Facebook chat room where, with Fite's permission, any Disneyland social club members could communicate online. Fite hosted podcasts where he discussed Disneyland and its social

---

[4] In addition to the Fites, the Sarnos also sued 20 other people (collectively referred to as Defendants) whose appeal is the subject of the related case, *Sarno v. Bailes* (July 18, 2019, G056460) [nonpub. opn.]. Additionally, the Sarnos sued the following: Jamie Manzuik; Elda Marchese; Brandon Morse; Nicole Navarro; Brandon Roebling; Kayla Roebling; Shaun Ryon; Disneyland Inc.; and Kaiser Foundation Health Plan, Inc., The Permanente Medical Group, Inc., Kaiser Foundation Hospitals, Inc. (Kaiser). The Sarnos alleged negligence claims against Disneyland and Kaiser.

clubs. Fite's podcasts aired on iTunes, Mixcloud, SoundCloud, YouTube, Facebook, Podbean, Spotify, and Player FM.

D. MSF & "The Mermaids"

While at Disneyland in early 2016, the Sarnos met Gabriella Soto, who was a member of the social club "The Mermaids," and Soto's daughter (Little Doe).[5] One day at the park, Soto and Little Doe were walking with MSF members to a ride when someone bumped into John, which knocked him off balance. Little Doe saw this and said, "Don't worry, I've got your back[]" and "I'll be your bodyguard." When they got to the ride there was a long line. Soto asked if she could leave Little Doe with MSF members. They agreed and made arrangements with Soto to meet after the ride. After the ride ended, MSF members walked Little Doe to the designated meeting place where they met Soto.

E. Disneyland Coins

About the same time, MSF ordered 40 limited edition, numbered "Tomorrowland" coins. MSF planned to use the coins as an admission ticket to a barbeque later that summer, and MSF members also used the coins in a scavenger hunt game—when someone found the coin he/she took a photograph of the coin and posted it on social media. MSF distributed coins to 38 people at the park, including Little Doe.[6]

F. Communication Between Little Doe & John

On the morning of February 16, 2016, Little Doe sent a message to the MSF Instagram account apologizing she had not posted a photograph of her coin. All MSF members had access to the MSF Instagram account (log in and password) and could

---

[5] Like the parties, we will refer to Soto's daughter as Little Doe.

[6] We take judicial notice of the record in *Sarno et al. v. Bailes et al., supra*, G056460. (Evid. Code, § 452, subd. (d).) In her declaration, Soto stated John told Little Doe the coin entitled her to admission to Club 33, a private club at the park. In his declaration, John denied this.

see any messages sent to or from that account. The following communications were all sent through the MSF Instagram account.[7]

John responded it was "cool" she planned to post a photograph of the coin and said, "I'm glad you have my back." Little Doe responded, "I got chu I got chu." John reminded Little Doe that she needed the coin to get into the barbeque and participate in the games. Little Doe asked if her coin entitled her or her family admission into the barbeque. John answered her family. Little Doe said that was "good" because her mother did not have a coin. John stated she was not "cool enough" and he gave Little Doe the last coin. Little Doe said she was "lucky."

Late the following evening, John asked, "You going to have my back on the 28th? I need my peeps with me." The following morning, Little Doe said it depended on her mother.

On February 24, 2016, John stated the following: "I'm going to need my body guard Sunday. Hope you are ready for Sunday Funday." Little Doe apologized because she lost her coin at the park. John stated she could have his coin because she deserved to have it. After he asked whether she checked lost and found, he said, "But I got your back." After a couple messages about lost and found, John repeated she could have his coin. Little Doe said he was the "best." John said he had another coin for her because "I can't have my bodyguard coinless." Little Doe asked how she was his bodyguard. John stated, "If anybody pushes me down and kicks popcorn in my face you take the popcorn and run." Little Doe said she would get the popcorn and the drink. John responded with two images: a red and white striped box with popcorn; and a glass mug filled with amber liquid and foam rolling down the side of the mug. Little Doe

[7] We provide the messages verbatim without correcting or noting errors in spelling, usage, or grammar. Additionally, many of the messages and communications between John and Jakob include italics and bold. We have omitted the italics and bold without indicating the omissions for ease of reading.

replied, "Lol I don't drink beer." John stated the following: "Neither do I but I couldn't find soda. So it's cream soda in a ice cold mug." Little Doe responded affirmatively.

Two weeks later, John stated, "Happy Wednesday, almost time to be at the park." Little Doe asked when he was going to the park. John replied, "We will be in the park towards the end of the month."

About one month later, on April 3, 2016, at 2:35 a.m., John stated the following: "You all in the park tomorrow? We will be and I need my bodyguard." Soto sent the following message: "Hey this is [Little Doe's] mom please don't message [her] if u want to hang out w the mermaids message me u have no reason to contact my daughter or else precautions will be taken place!" The next morning at 10:55 a.m., John replied the following: "I'm sorry I'm so use to talking the young adults I don't think. You are very right. Wanted to let you all know we were here." Soto responded, "Yea but this is a child n I don't like that so I would appreciate if u can not message her it is weird that u would want to have a relationship w a child thank u m we will b at the parks later." John replied the following: "I agree 100% with you. See you later. I thought you knew she texted to ask a question."

G. Interactions Between Soto & John

In April 2016, the Sarnos visited Disneyland and saw Soto and Little Doe at least once. John and Soto provided different accounts of their interactions. John stated he apologized to Soto, and she accepted his apology. Soto said John appeared uncomfortable and avoided her.

H. Interactions Between John & Jakob

John and Jakob disagree about when they first met. John stated that while he was at California Adventure in April 2016, Jakob and two male WR members approached him. Jakob said he was the head of WR and "nothing happens in Disneyland without my permission." Jakob told John that he was the park's "unofficial security" and MSF could only do the walk if he paid Jakob $500 to "provide security." John said the

walk would be free to participants and they expected it to be peaceful. Jakob repeated WR "kept all the [s]ocial [c]lubs in 'order'" and "you will be paying us for security or your social club will be going away." Jakob disputes this meeting occurred and denied ever demanding money from him—Jakob asserted he did not meet John until September 11, 2016, the day of the fundraiser.

On August 22, 2016, John sent a message to Jakob through the Club Hub Facebook page to ask if he could post updated information about the walk. Jakob agreed.

On August 30, 2016, Jakob sent a message to John through the Club Hub Facebook page about a complaint from Soto. In the message Jakob asked John why he was sending messages to 12-year-old Little Doe and that a police officer in John's hometown said John had "complaints against [him]." John explained his conduct related to a coin and said he did not have any complaints against him. After Jakob said Soto confronted John in the park, John denied the confrontation occurred. Jakob requested copies of John's messages to Little Doe so he could "clear it up before a wild fire burns." Jakob added, "I don't fuck around with kid stuff."

The next day, Jakob sent John a message stating he paid to have a background check run on him. Jakob said it did not appear John was a firefighter but was impersonating one. He acknowledged Little Doe contacted John first, but John continued to message her for one month. Jakob concluded that when he confirmed what John had done, he would give John "a couple options of what you can do." John responded he had been through multiple background checks for professional and personal reasons and had nothing to hide. He added Jakob could do what he thought he should do, but "there are always consequences for every action." Jakob agreed John's messages to Little Doe were not criminal but they were inappropriate and Jakob made veiled threats.

About an hour later, Jakob sent John the following message: "You fucked up. In a big way. And you cannot be allowed around the [social club] community. Now there are a couple ways to do that. You come down do your walk and after that never

show up in a vest in the parks again. Or if you refuse. I put all the messages and the proof your not a firefighter when I get the hard copy and put it together and spread the word everywhere and you can be hated by hundreds of people. And show everything to security get your pass revoked and make you the poster boy of what not to do in the SC community." Jakob added, "Does your wife know that your were contacting 12 yo girls? . . . Does the rest of your family need to know your kids, the foster agency." John agreed to leave MSF but asked Jakob to come to the walk because he had a gift for him.

I. The MSF 9/11 Walk

A few days before the fundraiser, the Sarnos travelled to Disneyland to set up the event. On September 10, 2016, MSF members conducted registration for the walk as John stood nearby. The same two male WR members who John claimed approached him with Jakob in April arrived and told John to meet Jakob the following day at 4 p.m. at the flag lowering ceremony in Disneyland. John agreed.

On September 11, 2016, the MSF fundraiser walk occurred without incident.

John and Jakob disagreed about what happened when they met. John stated that at the appointed time and place, John met Jakob, who was accompanied by four men wearing WR jackets. Jakob asked, "Where's my $500?" John said he was not going to pay him. Jakob, who was angry, said, "Are you scared? Do you know I can destroy you? There won't be anything you can do about it." After Jakob put his hand on John's shoulder and pulled him close, John said "F[uck] you, take your hand off of me and don't threaten me again." As the five men moved towards him, John told them to "back off." Jakob said he was going to destroy John's reputation and "You don't know who you are dealing with, and you'll be sorry." John pushed past the group and left the park with Leslee. The Sarnos have not returned to Disneyland. Jakob stated John accosted him during this meeting.

Two days later, Jakob sent John a message with a link to a SoundCloud podcast that was scheduled to air that night. Jakob included the following message: "Hey here is a little sample of what's going to be going on the public radio show tonight dedicated to you. . . . It's going to be epic. Remember I told you to walk away but you asked for the flood of attention that your going to get." Jakob threatened to distribute the podcast widely.

J. After the "9/11" Event

After the event, the Sarnos traveled to Henderson, Nevada to visit John's widowed mother. After returning to Sacramento, Leslee donated $1,055 to the Michael Lynch Memorial Foundation. Shortly after the Sarnos returned home, they learned Jakob was writing terrible things about them on the Club Hub and WR Facebook pages. The Sarnos had previously been accepted to access those social media sites and could view and print messages. Transcripts of the podcasts span hours.

K. The Fites', WR Members', and Defendants' Conduct

Following Jakob's September 13, 2016, message to John, the Fites, WR members, and Defendants used social media to discuss the Sarnos. On September 16, 2016, Jakob posted a message on Facebook that stated he was willing to go to Facebook prison because of "John the pedophile." One or more WR members made oral and written statements John was a pedophile/child predator, the Sarnos engaged in fraud and stole fundraising money to use for personal and in some cases illicit activity, and John stole valor by impersonating a firefighter. Jakob obtained the Sarnos' medical records through a WR member who worked at Kaiser Permanente and disclosed their medical information on podcasts, which resulted in online posts discussing the Sarnos' fertility issues and prescription drug use.

II. Procedural Facts

After the Sarnos filed a complaint on September 11, 2017, they filed a first amended complaint (FAC) against the Fites alleging the following causes of action:

defamation; invasion of privacy; intentional infliction of emotional distress (IIED); negligent infliction of emotional distress (NIED); and civil conspiracy.

The following is a non-exhaustive list of the FAC's allegations against the Fites and WR members: printed T-shirts with John's name and/or likeness warning he was a pedophile and wore them in the park; printed and posted photographs of John in Sacramento stating he was a pedophile; superimposed photographs of the Sarnos on other images accusing them of committing crimes of moral turpitude; accused the Sarnos of fraudulently stealing fundraiser proceeds and using the money to gamble; made false reports to law enforcement, online payment system, and media the Sarnos committed fraud and theft; unlawfully accessed the Sarnos' medical records, distributed that information, and posted that information online and conducted other background checks; accused the Sarnos of being drug addicts and published the medications they used; performed, broadcasted, republished, posted, reposted, and tagged podcasts and videos that on social media platforms that defamed the Sarnos; and conspired to broadcast and broadcasted live podcasts at a local park near the Sarnos' home and Leslee's place of employment to defame the Sarnos.

The defamation claim detailed Jakob's, Melissa's, and WR members' oral/written statements. The invasion of privacy claim incorporated by reference the FAC's allegations and alleged the Fites intruded into their private information by conducting unauthorized background checks and obtaining their medical records. The IIED and NIED claims stated the Fites' conduct caused the Sarnos to suffer emotional distress. Finally, the civil conspiracy claims alleged the Fites conspired with WR members and Defendants to defame, invade the Sarnos' privacy, and cause them emotional distress.

The Fites filed a special motion to strike each of the causes of actions and specific portions of the FAC, including 11 podcasts; WR members' statements (at least 23); Jakob's oral statements during the 11 podcasts; Jakob's written statements (at least

34); Melissa's oral statements during the 11 podcasts; and Melissa's written statement. The Fites argued the Sarnos' claims arose from protected speech because they were on a public forum (the Internet) and concerned a matter of public interest (John's conduct towards Little Doe and the Sarnos' fraud). In his declaration, Jakob denied trying to extort money from John. He also claimed someone gave him the Sarnos' medical records "without [his] prompting."

The Sarnos filed an opposition supported by exhibits and declarations from John, Leslee, and Robert Venezia. In his declaration, John denied preying on or "groom[ing]" Little Doe or any other illicit intent. He denied appearing at "a fire event" or "emergency incident" and claiming he was a firefighter, paramedic, or EMT. In their declarations, the Sarnos denied using any of the MSF fundraiser walk proceeds to gamble. In his declaration, Venezia stated he was a private investigator who interviewed Tiernan Curl, a former Disneyland social club member. Curl told Venezia that Jakob obtained the Sarnos' medical records from Nicole Navarro, a Kaiser employee who was trying to become a WR member. The Fites filed a reply.

At a hearing on the motion, counsel for the Fites conceded he did not have any evidence John was a pedophile and he did not claim John ever slept with a child but he "offer[ed] the evidence in that in the discussion the information is provided." Counsel asserted the reader is left to make his/her own conclusion. The trial court opined, "It was an accusation. It was intended to be an accusation. It can only be read as an accusation. And there's conflicting evidence." The court added counsel was in a difficult position because some of the FAC's allegations were not detailed or clear and thus it was difficult to attack. The court reasoned though that like the Defendants in *Sarno v. Bailes, supra*, G056460, the Fites' special motion to strike fails on the invasion of privacy claim. The court continued, "[B]ut there are others of these allegations that I think are imprecise and leaves you without an opportunity to attack them[.]" The court concluded the Sarnos

demonstrated a probability of prevailing based on their sworn declarations. The court denied the Fites' special motion to strike.

DISCUSSION

"Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success. We have described this second step as a 'summary-judgment-like procedure.' [Citation.]" (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384-385, fn. omitted (*Baral*).)

Section 425.16, subdivision (e), provides four categories of such acts. The Fites rely on the last two: "(3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

Defendants' Initial Burden

Although the *Baral* court was concerned with the second prong (*Baral, supra,* 1 Cal.5th at p. 385), it provided guidance on the first prong analysis (*id.* at p. 396). "At the first step, the moving defendant bears the burden of *identifying all allegations of protected activity*, and the claims for relief supported by them. When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage. If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached." (*Ibid.*, italics added.) Our review is de novo. (*Gaynor v. Bulen* (2018) 19 Cal.App.5th 864, 876.) "'If the trial court's decision is correct on any theory . . . , we affirm the order regardless of the correctness of the grounds on which the lower court reached its conclusion.' [Citation.]" (*Ibid.*)

"'It is the appellant's responsibility to support claims of error with citation and authority; this court is not obligated to perform that function on the appellant's behalf.' [Citation.] . . . [Citation.] Matters not properly raised or that are lacking in adequate legal discussion will be deemed forfeited. [Citation.] [¶] In other words, it is not this court's role to construct theories or arguments that would undermine the judgment and defeat the presumption of correctness. Rather, an appellant is required to present a cognizable legal argument in support of reversal of the judgment. 'When an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary.' [Citation.] 'Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, [they are] waived.' [Citation.]" (*Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 599-600.)

Here, the Fites fail to demonstrate what portions of the FAC arose from protected activity and should be struck. We recognize the FAC includes references to 11 podcasts without specifying the statements made in those podcasts. However, in their special motion to strike, the Fites include 58 paragraphs of statements that they claim are protected activity. Below and on appeal, the Fites argue the statements were protected because they were made on a public forum (the Internet) and concerned a matter of public interest (John's conduct towards Little Doe and the Sarnos' fraud), and they did not engage in illegal conduct. On appeal, they do not discuss any of the statements, and leave this court to evaluate whether each of the statements satisfies section 425.16, subdivision (e)(3) or (e)(4). De novo review does not require this court to cull the record to determine what portions of the FAC should be struck. For this reason alone they have not satisfied their burden on appeal.

Matter of Public Interest

Even if the Fites met their burden of identifying what they believed was protected activity, a review of the activity generally referenced in the record demonstrates

none of it was protected. Although section 425.16 does not define "an issue of public interest," decisional authority has provided some guidance. Mere curiosity is not a matter of public interest. (*Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1132.) For a matter to be considered a matter of public interest, it should be a matter of concern to a substantial number of people. (*Ibid*.) A matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest. (*Ibid*.) There should also be a degree of closeness between the challenged statements or activity and the asserted public interest. (*Ibid*.) The assertion of a broad and amorphous public interest is insufficient. (*Ibid*.) And the focus of the speaker's conduct should be the public interest, not a private controversy. (*Id*. at pp. 1132-1133.)

The Fites' investigation was mere curiosity arising out of a private controversy, not a public controversy. The Fites' personal misgivings about John's text messages with Little Doe did not amount to a matter of public interest. At best, the interested audience was a small one consisting of fellow WR members. Although pedophilia is matter of concern to a substantial number of people, the assertion of such a broad and amorphous public interest is not sufficient to render the Fites' activity protected.

Additionally, the Fites fail to demonstrate the Sarnos' invasion of privacy claim arose from protected activity. The invasion of privacy claim was based on the Fites and WR members conducting background checks on them and accessing, distributing, and posting the Sarnos's Kaiser medical records to humiliate them. The claim asserts this information included the medications physicians prescribed to them.

In their special motion to strike and on appeal, the Fites do not explain how the Sarnos' medical records were an issue of public interest, but limit their argument to an assertion their conduct was not illegal. The Fites and WR members accused John of being a child predator and John and Leslee of fraud and stealing fundraiser money. How is accessing, obtaining, distributing, and posting *Leslee's* medical records a matter of

public interest? The Fites offer no explanation as to how Leslee's medical records would reveal whether she engaged in fraud or stole charitable contributions. Or was their goal more sinister—did they merely want to humiliate her because they felt she was complicit in John's conduct.[8] On September 22, 2016, in a Facebook post, Jakob wrote the following: "I think now it's just pure entertainment. By the way his medical records show that he is a major pill popper pain killers and benzo." Regardless of their motive, the Fites' and WR members' conduct concerning Leslee was not a matter of public interest.

The same reasoning must be applied to the Fites' assertion that obtaining, distributing, and posting John's medical records was a matter of public interest. Similar to Leslee, John's medical records were of no relevance to the issue of whether he engaged in fraudulent conduct vis-à-vis the MSF fundraiser walk. Nor were his medical records relevant to whether he was a child predator. The Fites offer no explanation about how John's medical records would assist in determining whether he preyed on Little Doe, or had preyed on any child in the past. Had John been convicted of an offense against a child that information would have been available through court records or the Megan's Law Web site. The record includes no evidence John was ever convicted of a crime against a child. This was simply curiosity on the Fites' part. At the hearing on the special motion to strike below, the Fites' counsel admitted as much. It appears from the record before us Jakob went on a fishing expedition to obtain information about the Sarnos to humiliate them. He succeeded, and numerous other people assisted Jakob in his misbegotten adventure. The Fites' and WR members' conduct concerning John was not a matter of public interest. Thus, the basis of the Sarnos' invasion of privacy claim did not arise from the Fites' free speech rights and was not protected by section 425.16.

---

[8] See *Sarno v. Bailes, supra,* G056460 at page 17, footnote 13.

Sanctions

After oral argument this court advised counsel and the Fites it was considering imposing sanctions on the grounds this appeal is frivolous, included numerous misrepresentation to this court, and was taken and maintained solely for the purpose of causing delay. After this court provided notice of the possibility of sanctions, it held a hearing.

Code of Civil Procedure section 907 allows a reviewing court to "add to the costs on appeal such damages as may be just" when it appears that an appeal is frivolous or taken solely for delay. California Rules of Court, rule 8.276(a) allows the Court of Appeal on its own motion to impose sanctions on a party or an attorney for: "(1) Taking a frivolous appeal or appealing solely to cause delay; [¶] (2) Including in the record any matter not reasonably material to the appeal's determination; [¶] (3) Filing a frivolous motion; or [¶] (4) Committing any other unreasonable violation of these rules."

In *In re Marriage of Flaherty* (1982) 31 Cal.3d 637 (*Flaherty*), the California Supreme Court explained the rationale for the imposition of sanctions against a party by a reviewing court: "An appeal taken for an improper motive represents a time-consuming and disruptive use of the judicial process. Similarly, an appeal taken despite the fact that no reasonable attorney could have thought it meritorious ties up judicial resources and diverts attention from the already burdensome volume of work at the appellate courts." (*Flaherty, supra*, 31 Cal.3d at p. 650.) *Flaherty* set forth both an objective and subjective standard for determining whether an appeal is frivolous: An appeal is considered frivolous "when it is prosecuted for an improper motive -- to harass the respondent or delay the effect of an adverse judgment -- or when it indisputably has no merit -- when any reasonable attorney would agree that the appeal is totally and completely without merit." (*Ibid*.) "The two standards are often used together, with one providing evidence of the other. Thus, the total lack of merit of an appeal is viewed as evidence that appellant must have intended it only for delay." (*Id*. at p. 649.)

At oral argument, this court indicated that based on a review of the facts and the applicable law it was inclined to conclude this appeal was frivolous. It then asked counsel to explain why he believed this appeal had merit. The responses were less than availing.

In his briefing before the sanctions hearing, counsel suggested he believed his clients' activity and statements were absolutely protected and the court's focus could only be whether the Sarnos had met their burden of demonstrating a probability of prevailing. Again at the sanctions hearing, this court attempted to ascertain on what basis counsel concluded this appeal had merit. Given counsel's fixed and firm belief his clients had only engaged in protected activity, the court's efforts to have counsel address the question of what constituted protected activity were futile. Counsel simply provided "war stories" based on other cases he had handled and the opinion of a lawyer in his office to establish the merits of this appeal. Efforts on the part of this court to engage in a substantive discussion as to the law and the facts of this case were futile.

"'Sanctions may be ordered against a litigant [citation] and/or against the lawyer.' [Citation.] Sanctions are warranted against a lawyer 'who, because the appeal was so totally lacking in merit, had a professional obligation not to pursue it.' [Citation.]" (*Workman v. Colichman* (2019) 33 Cal.App.5th 1039, 1065.)

Based on our independent analysis of this appeal and considering counsel's explanation as to its merits, we find this appeal indisputably has no merit. Any reasonable attorney would agree the appeal is totally and completely without merit. Accordingly, we find the appeal to be frivolous and thus for purposes of delay. Therefore, we impose sanctions in the amount of $500 payable to the court for the inconvenience to the court in hearing a frivolous appeal, the expenditure of court resources in processing the appeal, and negatively impacting the administration of justice.

We also caution counsel that when citing the record counsel must accurately and fairly summarize the facts. In initially reviewing the briefs, the court had concerns about appellate counsel's representation of the record. Counsel states "[John] began messaging with [Little Doe,]" suggesting John initiated the conversation. The record before us establishes Little Doe initiated the contact with John when she texted the MSF Instagram site to apologize she had not posted a photograph of the coin. On numerous occasions, counsel asserts John's texts were "suggestive," "highly inappropriate," and "disturbing." But counsel does not explain which comments were suggestive, inappropriate, or disturbing, leaving the reader to assume the worst about John's intentions.

Most offensive is counsel's comment "One of the messages was sent round 2:00 a.m., and John . . . appears to be attempting to separate [Little Doe] from her mother so that he can meet with [Little Doe] at the [p]ark on a future date." The comment counsel refers to states in its entirety, "You all in the park tomorrow? We will be and I need my bodyguard." Clearly when John says "all" he is referring to Little Doe and her mother, and when he says "we" he is referring to himself and his wife. The record before us included no evidence John attempted to separate Little Doe from her mother and counsel's assertion is reckless. We caution appellate counsel not to overstate or misrepresent the record under the cloak of effective advocacy because it, *at the very least*, violates court rules. (Cal. Rules of Court, rule 8.204(a)(1)(C)). The trial court properly denied the Fites' special motion to strike.

DISPOSITION

The order is affirmed. Respondents shall recover their costs on appeal. In addition, respondents shall recover the total amount of their attorney fees as apportioned by the trial court among the appellants.

As sanctions for bringing this frivolous appeal, Aaron P. Morris, California State Bar No. 130727, shall pay $500 to the clerk of this court and the clerk of this court

is directed to deposit said sums in the general fund. The sanctions shall be paid no later than 15 days after the date the remittitur is issued.

O'LEARY, P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.